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Before the
LIBRARY OF CONGRESS
United States Copyright Office
Copyright Arbitration Royalty Panel
Washington, D.C. 20024

GENERAL COUNSEL
OF COPYRIGHT

JUN 10 1998

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In the Matter of)

ADJUSTMENT OF RATES FOR)
NONCOMMERCIAL EDUCATIONAL)
BROADCASTING COMPULSORY LICENSE)

Docket No. 96-6 CARP NCBRA

REPLY OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS IN
FURTHER SUPPORT OF ITS MOTION TO STRIKE
CERTAIN PORTIONS OF PUBLIC BROADCASTERS' PROPOSED
REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Dated: June 18, 1998

Attorneys for ASCAP

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I.

ASCAP hereby submits the following reply to the Response of Public Broadcasters to ASCAP's Motion to Strike Certain Portions of Public Broadcasters' Reply Findings of Fact and Conclusions of Law, dated June 15, 1998 (the "Response"). Specifically, by its motion, dated June 12, 1998 (the "Motion"), ASCAP seeks to strike Reply Appendix A to Public Broadcasters Proposed Reply Findings of Fact and Conclusions of Law ("PB's Reply"), and certain paragraphs in PB's Reply relating to that Appendix.

II.

At page 2 of the Response, Public Broadcasters disavow their earlier claim that the Panel should consider Reply Appendix A as evidence of a "probative" fee methodology. Instead, they now claim to offer Reply Appendix A solely "to impeach the validity of ASCAP's approach" and purport that Reply Appendix A is a mere "series of mathematical calculations."

Even so limited, Reply Appendix A should still be stricken from the record.

(A) The new “mathematical calculations,” whether offered for impeachment or otherwise, were neither offered while the record was open nor sponsored by an expert witness. As such, the Panel is without any validation of these calculations. Public Broadcasters do not (and cannot) deny that the calculations are in fact based upon certain undisclosed assumptions and adjustments which require explanation, particularly the dubious discount for an alleged decline in the percentages of revenue paid by commercial broadcasters to ASCAP over the past twenty years. Had the new calculations been appropriately sponsored by an expert witness for Public Broadcasters, ASCAP would have shown either on cross-examination or rebuttal that, for example, the percentage of revenues commercial broadcasters pay for actual use of ASCAP’s music has, as a matter of fact, risen steadily since 1978.¹ ASCAP should not be precluded from introducing this fact (and the others outlined at pages five and six of the Motion) merely because Public Broadcasters have elected not to submit the new calculations in the appropriate manner (i.e., through the testimony of an expert sponsoring witness made available for cross-examination).

(B) Contrary to Public Broadcasters’ claim at page one of the Response, Reply Appendix A is not “based solely on data and evidence in the record.” Leaving aside infirmities in the comparability of the data relied upon in the new calculations (as discussed at pages five and six of the Motion and ignored by Public Broadcasters), portions of that data are not part of the record.

¹ Assuming that any adjustment should be made for changes in commercial license rates over time, the critical error in Public Broadcasters’ deduction for a “decline” in commercial effective rates is their assumption that commercial broadcasters’ use of ASCAP music has been constant since 1978. If one accounts for actual music use changes (as one must), it is clear that commercial broadcasters are now paying more for the ASCAP music they use.

For example, in their new calculations, Public Broadcasters request that their fees be reduced by 33% to reflect a purported drop in ASCAP's "music share" since 1976. This part of the new calculations, which would result in more than a \$10 million "swing" in the total license fees to be paid to ASCAP over the term of the license, is based entirely on a statistic quoted at page 49 of PB Ex. 27-X (ASCAP's post-hearing brief in the 1978 CRT proceeding). ASCAP cited there to a "Public Broadcasting Touche Ross survey." That survey apparently analyzed ASCAP's share of "performances" on public television stations in an unspecified year.² The survey itself is not in the record, although Public Broadcasters could have offered it through an appropriate sponsoring witness. Nor is there currently any evidence before the Panel regarding ASCAP's "music share" on the Public Radio Stations in 1978 or data regarding actual music broadcasts by the Stations in 1978. The lone Touche Ross statistic in PB Ex. 27X, without an appropriate sponsoring expert witness, does not provide a credible basis for supporting a \$10 million reduction in license fees should the Panel ultimately adopt a fee trending methodology.

The only evidence in the record regarding changes in the actual music use of the Stations over time is data reported in Dr. Boyle's direct testimony. Those data do not support any reduction in combined public television and radio fees for changes in the Stations' music use. See ASCAP Boyle Dir. at 10 (reporting a 28% rise in ASCAP music use by the Public Television Stations since 1990 and a 31% drop in ASCAP music use by the Public Radio Stations since 1990).

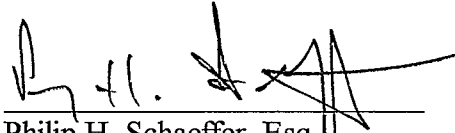
² ASCAP did not rely on the Touche Ross survey to calculate a fee proposal for Public Broadcasters in 1978. ASCAP's fee proposal in 1978 was, unlike its current proposal, irrespective of the relative uses of music by Public Broadcasters and commercial broadcasters and based on Public Broadcasters' total revenues (both public and private).

III.

For the foregoing reasons and those set forth in the Motion, the Panel should strike Reply Appendix A and paragraphs 117, 118, 121, 122 and 129 of PB's Reply.

Dated: New York, New York
June 18, 1998

Respectfully submitted,



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Dated: New York, New York
June 18, 1998


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June 11, 1998

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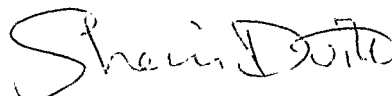
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Re: Noncommercial Educational Broadcasting
Compulsory License (Docket No. 96-6
CARP NCBRA

Dear Ms. Giuffreda:

Pursuant to the Protective Order in this proceeding dated October 1, 1997, Broadcast Music, Inc. ("BMI") submits six copies of a redacted public version of the following document previously filed under seal: Proposed Findings of Fact and Conclusions of Law of Broadcast Music, Inc., dated May 29, 1998.

Respectfully submitted,



Sherri N. Duitz

Enclosure

cc: Counsel of Record (without enclosures)

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